

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH HENRY RICHMIRE,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,¹

Defendant.

CASE NO. 12cv5037-BHS-JRC

REPORT AND
RECOMMENDATION ON
PLAINTIFF'S APPLICATION
FOR COSTS AND ATTORNEY'S
FEES

Noting Date: May 17, 2013

This matter has been referred to United States Magistrate Judge J. Richard
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,
271-72 (1976). This matter is before the Court on plaintiff's contested motion for

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security
Administration on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil
Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit.

1 attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and costs
2 pursuant to 28 U.S.C. § 1920 and has been fully briefed (*see* ECF Nos. 20, 22, 23).

3 Subsequent to plaintiff's success at obtaining a reversal of the decision of the
4 Social Security Administration, defendant Commissioner challenged plaintiff's request
5 for statutory attorney's fees on the grounds that the requested fees are unreasonable given
6 the circumstances of this case (*see* Response, ECF No. 22, p. 2 (*citing* 28 § U.S.C.
7 2412(b))).

8 After considering and reviewing the record, including plaintiff's Application for
9 Costs and Fees, and the attached time and expense sheet (*see* ECF No. 20), as well as the
10 excellent results obtained by plaintiff's counsel, the Court finds that plaintiff's fee request
11 is reasonable, after the reduction of 0.5 hours agreed to by plaintiff (*see* Reply, ECF No.
12 23, p. 4).

13 Therefore, plaintiff's motion for fees, costs and expenses should be granted
14 pursuant to 28 U.S.C. § 1920 and the Equal Access to Justice Act, 28 U.S.C. § 2412
15 ("EAJA") in the amount of \$6,871.50 in attorney's fees for 37.4 hours incurred and \$350
16 for costs.
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18 BACKGROUND and PROCEDURAL HISTORY

19 Plaintiff, JOSEPH HENRY RICHMIRE, filed an application for Social Security
20 Income and Child's Insurance Benefits which was denied initially and following
21 reconsideration (*see* Tr. 12, 65-79, 111-22). His requested hearing was held before
22 Administrative Law Judge M.J. Adams ("the ALJ") on March 15, 2010 (Tr. 30-51, 80-
23

1 82). On April 22, 2010, the ALJ issued a written decision in which he found that plaintiff
2 was not disabled pursuant to the Social Security Act (Tr. 9-23).

3 On November 22, 2011, the Appeals Council denied plaintiff's request for review,
4 making the written decision by the ALJ the final agency decision subject to judicial
5 review (Tr. 1-6). *See* 20 C.F.R. § 404.981. On January 16, 2012, plaintiff filed a
6 complaint in this Court, seeking judicial review of the ALJ's written decision (*see* ECF
7 No. 1).

8 On November 9, 2012, the Court issued a Report and Recommendation on
9 plaintiff's complaint ("R&R") recommending that this matter be reversed and remanded
10 for further consideration (ECF No. 16). Among other reasons discussed, the Court found
11 that the ALJ erred in his interpretation and assessment of the opinion of an examining
12 doctor and relied on a finding not based on substantial evidence in the record as a whole
13 (*see id.*, pp. 10-13). The Court also found that the ALJ's error was not harmless (*see id.*,
14 p. 14). This R&R was adopted by the Court, and this matter thereby reversed in early
15 December, 2012 (*see* ECF Nos. 17, 18).

17 On February 5, 2013, plaintiff filed a motion for attorney's fees pursuant to the
18 Equal Access to Justice Act, 28 § U.S.C. 2412 (*see* ECF No. 20). Defendant does not
19 object to plaintiff's request for \$350 reflecting costs, however, on February 19, 2013,
20 defendant objected to plaintiff's request for attorney's fees in the amount of \$6,265.19 as
21 unreasonable given the circumstances of this case (*see* Response, ECF No. 22, pp. 1-2
22 (*citing* 28 § U.S.C. 2412(b))).
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STANDARD OF REVIEW

In any action brought by or against the United States, the EAJA requires that "a court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

According to the United States Supreme Court, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government has the burden of proving that its positions overall were substantially justified. *Hardisty v. Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010), *cert. denied*, 179 L.Ed.2d 1215, 2011 U.S. LEXIS 3726 (U.S. 2011) (*citing Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir. 1995)). Further, if the government disputes the reasonableness of the fee, then it also "has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (citations omitted). The Court has an independent duty to review the submitted itemized log of hours to determine the reasonableness of hours requested in each case. *See Hensley, supra*, 461 U.S. at 433, 436-37.

DISCUSSION

In this matter, plaintiff clearly was the prevailing party because he received a remand of the matter to the administration for further consideration (*see* R&R; Order

1 Adopting R&R, ECF Nos. 16, 17). In order to award a prevailing plaintiff attorney fees,
2 the EAJA also requires a finding that the position of the United States was not
3 substantially justified. 28 U.S.C. § 2412(d)(1)(B). Defendant implicitly conceded that the
4 government's position was not substantially justified, as defendant argues that plaintiff's
5 recovery for attorney's fees should be reduced, not eliminated (*see* Defendant's Response
6 to Plaintiff's EAJA Motion for Fees, ECF No. 22, pp. 2-3).

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8 The Court agrees with defendant's implicit concession (*see id.*). This conclusion is
9 based on a review of the relevant record, including the government's administrative and
10 litigation positions regarding the evaluation of the medical evidence. For these reasons,
11 and based on a review of the relevant record, the Court concludes that the government's
12 position in this matter as a whole was not substantially justified. *See Guitierrez v.*
13 *Barnhart*, 274 F.3d 1255, 1258-59 (9th Cir. 2001) (citations omitted).

14 The undersigned also concludes that no special circumstances make an award of
15 attorney fees unjust. *See* 28 U.S.C. § 2412(d)(1)(A). Therefore, all that remains is to
16 determine the amount of a reasonable fee. *See* 28 U.S.C. § 2412(b); *Hensley, supra*, 461
17 U.S. at 433, 436-37; *see also Roberts v. Astrue*, 2011 U.S. Dist. LEXIS 80907 (W.D.
18 Wash. 2011), *adopted by* 2011 U.S. Dist. LEXIS 80913 (W.D. Wash. 2011).

19 Once the court determines that a plaintiff is entitled to a reasonable fee, "the
20 amount of the fee, of course, must be determined on the facts of each case." *Hensley,*
21 *supra*, 461 U.S. at 429, 433 n.7. According to the U.S. Supreme Court, "the most useful
22 starting point for determining the amount of a reasonable fee is the number of hours
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1 reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley*,
 2 *supra*, 461 U.S. at 433.

3 Here, plaintiff prevailed on the single claim of whether or not the denial of her
 4 social security application was based on substantial evidence in the record as a whole and
 5 not based on harmful legal error. When the case involves a “common core of facts or will
 6 be based on related legal theories the district court should focus on the
 7 significance of the overall relief obtained by the plaintiff in relation to the hours
 8 reasonably expended on the litigation.” *See Hensley, supra*, 461 U.S. at 435. The
 9 Supreme Court concluded that where a plaintiff “has obtained excellent results, his
 10 attorney should recover a fully compensatory fee.” *Id.*

12 Because the Court concludes based on a review of the relevant evidence that the
 13 plaintiff here obtained excellent results, the Court will look to “the hours reasonably
 14 expended on the litigation,” which, when combined with the reasonable hourly rate,
 15 encompasses the lodestar. *See Hensley, supra*, 461 U.S. at 435. Other relevant factors
 16 identified in *Johnson, supra*, 488 F.2d at 717-19 “usually are subsumed within the initial
 17 calculation of hours reasonably expended at a reasonable hourly rate,” but are considered
 18 herein.² *See Hensley, supra*, 461 U.S. at 434 n.9 (other citation omitted); *see also Kerr v.*
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20 ² The *Johnson* factors are: (1) The time and labor involved; (2) the novelty and difficulty
 21 of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the
 22 preclusion of other employment by the attorney due to acceptance of the case; (5) the customary
 23 fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the
 24 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation,
 and ability of the attorneys; (10); the ‘undesirability’ of the case; (11) the nature and length of
 the professional relationship with the client; and (12) awards in similar cases. *Johnson, supra*,
 488 F.2d at 717-19) (citations omitted); *see also United States v. Guerette*, 2011 U.S. Dist.

1 *Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting *Johnson* factors);
 2 *Stevens v. Safeway*, 2008 U.S. Dist. LEXIS 17119 at *40-*41 (C.D. Cal. 2008) (“A court
 3 employing th[e *Hensley* lodestar method of the hours reasonably expended multiplied by
 4 a reasonable hourly rate] to determine the amount of an attorney’s fees award does not
 5 directly consider the multi-factor test developed in *Johnson, supra*, 488 F.2d at 717-19,
 6 and *Kerr, supra*, 526 F.2d at 69-70”); *but see Goodwin v. Astrue*, 2012 U.S. Dist. LEXIS
 7 97651 at *10-*12, *14-*20 (W.D. Wash. 2012) (applying *Johnson* factors), *adopted by*
 8 2012 U.S. Dist. LEXIS 97650 (W.D. Wash. 2012).

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 10 Subsequent to determining “the hours reasonably expended on the litigation,” *see*
 11 *Hensley, supra*, 461 U.S. at 435, the Court will consider any relevant *Johnson* factors
 12 “that have not been subsumed within the lodestar calculation” and determine whether or
 13 not the resultant fee should be adjusted upwards or downwards. *See Stevens, supra*, 2008
 14 U.S. Dist. LEXIS 17119 at *41. These guidelines are consistent with Washington Rules
 15 of Professional Conduct 1.5.

16 As defendant does not object to plaintiff’s request for reimbursement for costs and
 17 does not object to plaintiff’s requested hourly rate for his attorney’s fees request, the
 18 gravamen of defendant’s contentions here concern “the number of hours reasonably
 19 expended on the litigation” (*see* ECF No. 22, p. 1). *See also Hensley, supra*, 461 U.S. at
 20 433.

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 22 LEXIS 21457 at *4-*5 (D. Hi 2011) (“factors one through five have been subsumed” in
 23 the determination of a number of hours reasonably expended multiplied by a reasonable
 24 rate); *but see City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting factor 6 of contingent
 nature of the fee).

1 Defendant contends that although the 17.6 hours to prepare for and draft the
2 Opening Brief herein normally would be an appropriate amount of time to spend on an
3 opening brief, it was unreasonable here as plaintiff's Opening Brief was short, plaintiff
4 raised only one issue, and that the issue raised by plaintiff was simple, and not complex
5 (*see* Response, ECF No. 22, pp. 2-3). Defendant similarly contends that plaintiff spent
6 too much time on the Reply brief as it contained a little over a page of text (*see id.*, p. 3).
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8 Plaintiff notes that defendant challenges only the amount of time expended, and
9 further replies that "defendant confuses brevity with simplicity" (*see* Reply, ECF No. 23,
10 p. 3). Plaintiff also indicates that time was incurred for potential arguments considered
11 and rejected before inclusion into the Opening Brief which neither defendant nor the
12 Court were required to incur time considering (*see id.*). Plaintiff also indicates that much
13 of the time incurred in preparing the Reply "is directly attributable to the fact that the
14 Defendant's Responsive Brief raised the new issue of harmless error, which plaintiff had
15 to research and respond to in his Reply Brief" (*see id.*).

16 Plaintiff's reply is persuasive. The Court notes that there is time incurred regularly
17 by attorneys in the preparation of briefs that is not reflected by an explicit argument in the
18 final draft of the brief. The Court likewise reviewed portions of the record and considered
19 issues in the matter herein that were not indicated explicitly in the R&R issued by the
20 Court. The Court also is aware that writing a concise brief can take more time than
21 writing a long brief, which, by the way, the Court appreciates greatly.
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23 The Court notes that in all Social Security Appeals, the Court Orders that briefs
24 conform to Local Rules regarding page limits, in part for judicial efficiency, and did so in

1 the matter herein (*see* Order Setting Briefing Schedule, ECF No. 10 (“The length of the
 2 briefing shall conform to Local Rule CR 7(e)(3),” *i.e.*, Local Rule W.D. Wash. Civil
 3 Rules, Rule 7(e)(3))). In addition, the Court finds the following argument by plaintiff
 4 very persuasive:

5 This Court should not encourage or reward briefing that is unnecessarily
 6 long and is filled with unnecessary citations or raises numerous marginal
 7 arguments. Concise brief writing should not be penalized. The
 8 undersigned strives to file short concise briefs that usually consist of less
 9 pages than Defendant Commissioner’s briefings.

10 (Reply, ECF No. 23, p. 3).

11 Regarding time, labor and the experience of the attorney, the first and ninth factors
 12 referenced regarding determining the amount of reasonable attorney’s fees in *Johnson*,
 13 488 F.2d at 717-19, *see supra*, n.2, and adopted by the Ninth Circuit in *Kerr*, plaintiff
 14 was represented by Todd R. Renda, Esquire, (“counselor Renda”), an attorney
 15 experienced in Social Security matters. Counselor Renda indicated that time expended on
 16 this case included, among other things, multiple communications with plaintiff;
 17 reviewing the administration’s decision, the administrative record, defendant’s Answer
 18 and responsive brief, as well as the file; preparing the complaint; researching case law
 19 and federal regulations; drafting the opening brief and reply brief; reviewing notices and
 20 other case management tasks; reviewing the R&R and judgment; and, drafting the
 21 petition for costs and fees (*see* plaintiff’s Motion, ECF No. 20, pp. 2-3). As alluded to
 22 previously, following defendant’s objection to plaintiff’s motion for attorney’s fees,
 23 plaintiff agreed to withdraw his request for 0.5 hours of time that plaintiff agreed was
 24 inappropriately requested, as this time represented compensation for clerical tasks (*see id.*

1 at p. 2 (0.5 hours itemized for “Review Summons/Serve Complaint/Summons”); *see also*
2 Reply, ECF No. 23, p. 4).

3 Given the facts and circumstances of the matter herein, and based on plaintiff’s
4 briefing and his petition for fees, with the itemized time expenditures included, the Court
5 concludes that the amount of time incurred by plaintiff’s attorney in this matter is
6 reasonable. *See Hensley, supra*, 461 U.S. at 435. As plaintiff’s attorney “has obtained
7 excellent results, his attorney should recover a fully compensatory fee.” *Id.*

8 Regarding the novelty and difficulty of the questions involved and the skill
9 required in order to perform the legal service properly, the second and third factors
10 considered in *Johnson* and *Kerr, see also supra*, n.2, this case involved knowledge of
11 social security disability law as well as knowledge of the administrative appeal process
12 before the Social Security Administration. *See Johnson, supra*, 488 F.2d at 717-19; *see*
13 *also Kerr, supra*, 526 F.2d at 69-70. Therefore, specialized knowledge and skill were
14 required for the prosecution of this matter and plaintiff’s counsel has the requisite
15 experience and knowledge and is deserving of the full EAJA hourly rate.

16 The fourth factor considered in *Johnson*, 488 F.2d at 717-19, *see supra*, n.2, and
17 adopted by the Ninth Circuit in *Kerr*, is the preclusion of other employment by the
18 attorney due to acceptance of the case. *See Johnson, supra*, 488 F.2d at 717-19, *see also*
19 *Kerr, supra*, 526 F.2d at 69-70. Although plaintiff’s counsel could not work on other
20 cases while working on this matter, the extent to which plaintiff’s attorney was precluded
21 from other work does not appear to be any greater in this particular matter than occurs
22 with the acceptance of any case.
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1 Regarding the customary fee and awards in similar cases, the fifth and twelfth
2 *Johnson* and *Kerr* factors, the requested fee is not outside the range of the amount of
3 attorney's fees generally awarded in cases of this type. *See Johnson, supra*, 488 F.2d at
4 717-19, *see also Kerr, supra*, 526 F.2d at 69-70. In addition, defendant has not
5 challenged the hourly rate requested by plaintiff, which complies with the EAJA, of
6 \$183.73 (*see* ECF No. 20, p. 3). The rate is reasonable, given the skill and expertise of
7 counselor Renda.

8 Regarding whether the fee is fixed or contingent, and the time limitations imposed
9 by the client or the circumstances, the sixth and seventh *Johnson* and *Kerr* factors, these
10 factors here do not have much relevance to the determination of whether or not the
11 requested fee is reasonable. *See Johnson, supra*, 488 F.2d at 717-19, *see also Kerr, supra*,
12 526 F.2d at 69-70.

13 Regarding the eighth factor of the amount involved and the results obtained,
14 plaintiff here obtained excellent results and, hence, as noted previously, should obtain a
15 fully compensatory fee. *See Hensley, supra*, 461 U.S. at 435.

16 Regarding the tenth and eleventh factors, this case does not appear to have been
17 either desirable nor undesirable, and the nature and length of the professional relationship
18 with the client also does not appear to be relevant to the determination of whether or not
19 the requested fee is reasonable.
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21 Having considered the relevant factors from *Johnson* and *Kerr*, *see supra*, n.2, and
22 having reviewed the relevant record, including the attorney declaration and the time
23 itemization submitted by plaintiff's counsel in this matter, and having considered
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1 defendant's arguments, the Court concludes that plaintiff's requested fee award is
2 reasonable, given the 0.5 hour deduction already discussed. Therefore, plaintiff's motion
3 should be granted.

4 Plaintiff's request for attorney's fees has been voluntarily reduced by 0.5 hour,
5 from 34.1 hours to 33.6 hours (*see* Reply, ECF No. 23, p. 4). At \$183.73 hourly rate,
6 plaintiff is entitled to \$6,173.33 based on his original motion. Plaintiff also requests 0.4
7 hour to review defendant's response to plaintiff's motion for fees; 1.1 hours to research
8 the case law; and 2.3 hours to draft the reply brief to defendant's response to plaintiff's
9 motion for fees. The Court concludes that these additional 3.8 hours (\$698.17) incurred
10 defending plaintiff's petition for fees is reasonable.
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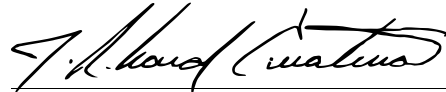
12 CONCLUSION

13 For the reasons stated, the Court concludes that the requested fee award is
14 reasonable. Therefore, plaintiff's motion for attorney's fees, in the amount of \$6,871.50,
15 should be granted pursuant to the EAJA and consistent with *Astrue v. Ratliff*, 130 S.Ct.
16 2521, 2524, 2010 U.S. LEXIS 4763 at ***6-***7 (2010). Plaintiff's award is subject to
17 any offset allowed pursuant to the Department of the Treasury's Offset Program. *See*
18 *Ratliff*, 130 S.Ct. at 2528. Plaintiff's request for costs in the amount of \$350.00 should be
19 granted pursuant to 28 U.S.C. §1920.

20 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
21 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
22 Civ. P. 6. Failure to file objections will result in a waiver of those objections for
23 purposes of *de novo* review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).
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1 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
2 matter for consideration on May 17, 2013, as noted in the caption.

3 Dated this 22nd day of April, 2013.
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7 J. Richard Creatura
8 United States Magistrate Judge
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